REDANG PARADISE VACATION SDN BHD v. YAP CHUAN BIN & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
HAMID SULTAN ABU BACKER JCA
UMI KALTHUM ABDUL MAJID JCA
[CIVIL APPEALS NO: T-04(W)-326-09-2016, T-04(W)-327-09-2016 & T-04(W)-328-09-2016]
11 SEPTEMBER 2017

CIVIL PROCEDURE: *Appeal – Notice of appeal – Service of – Procedure – Whether Rules of Court 2012 require service of duplicate copy within 14 days of date of decision – Whether endorsement or seal of court to be placed on notice of appeal – Rules of Court 2012, O. 55 r. 3(4) – Whether complied with – Whether courts could strike out a matter for non-compliance of ROC – Rules of Court 2012, O. 1A & O. 2*

The three appeals herein were related to a procedural point on a notice of appeal. Pursuant to the decisions by the Magistrate's Court in the three actions therein, the appellants filed a notice of appeal in Form 111 of the Rules of Court 2012 ('ROC'). The appellants served a duplicate copy of the notice of appeal within the stipulated time of 14 days from the date of decision. The High Court Judge ruled that it was not sufficient to serve a duplicate copy and held the copy served must be endorsed by the court.

Held (allowing appeals with no order as to costs)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) There is no requirement under Form 111 for any endorsement or seal of the court to be placed on the notice of appeal unlike a writ or originating process, *etc*. In light of O. 1A and O. 2 of the ROC, it is not an option for the courts to strike out a matter for non-compliance of the rules without giving an opportunity to the litigant to regularise the proceedings or to condone the irregularity by the fiat of the court. It is only in extremely rare cases where the non-compliance cannot be condoned at all that the court will be obliged to strike out the matter. Those are the cases where the respondent can demonstrate prejudice as well as can establish that the breach cannot be compensated by costs. (paras 6 & 7)

(2) The ROC only requires a duplicate copy of the notice of appeal to be served within the time frame. The notice of appeal herein as well as the duplicate copy of the appeal had been served on the respondent within the time frame and in compliance with O. 55 r. 3(4) of the ROC. There was no requirement in law or rules to require an endorsed notice of appeal to be served within the time frame of the appeal. Even if there is such a rule, it would cause a travesty of justice as it is common

knowledge that court documents and endorsement or seal of the court are not placed immediately upon filing at the court registry or even through the e-filing system. (paras 8 & 11)

Bahasa Malaysia *Headnotes*

Ketiga-tiga rayuan di sini berkait dengan perkara prosedur bagi notis rayuan. Menurut keputusan-keputusan Mahkamah Majistret dalam tiga tindakan di situ, perayu-perayu memfailkan notis rayuan dalam Borang 111 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Perayu-perayu menyerahkan salinan notis rayuan dalam tempoh 14 hari dari tarikh keputusan seperti yang diperuntukkan. Hakim Mahkamah Tinggi memutuskan bahawa penyerahan salinan tidak mencukupi dan memutuskan bahawa salinan yang diserahkan mesti diendorskan oleh mahkamah.

Diputuskan (membenarkan rayuan-rayuan tanpa perintah untuk kos) Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Tiada keperluan bawah Borang 111 bagi apa-apa pengendorsan atau meterai mahkamah diletakkan pada notis rayuan seperti bagi writ atau proses pemula, dan lain-lain. Menurut A. 1A dan A. 2 KKM, mahkamah tiada pilihan untuk membatalkan sesuatu perkara atas alasan ketidakpatuhan atau membiarkan ketidakpatuhan dengan perintah mahkamah. Hanya dalam kes-kes yang amat luar biasa di mana ketidakpatuhan tidak boleh dibiarkan langsung barulah mahkamah wajib membatalkan perkara tersebut. Itu adalah kes-kes di mana responden boleh menunjukkan wujud prejudis dan boleh membuktikan bahawa pelanggaran tersebut tidak boleh dipampas dengan kos.

(2) Kaedah-Kaedah Mahkamah hanya memerlukan salinan pendua notis rayuan diserahkan dalam rangka masa yang diperuntukkan. Notis rayuan di sini berserta salinan pendua rayuan telah diserahkan kepada responden dalam rangka masa dan mematuhi A. 55 k. 3(4) KKM. Tiada keperluan dalam undang-undang atau kaedah untuk pengendorsan notis rayuan diserahkan dalam rangka masa bagi rayuan. Jika pun wujud kaedah sedemikian, ia akan mengakibatkan persendaan keadilan kerana menjadi pengetahuan umum bahawa dokumen-dokumen mahkamah dan pengendorsan atau meterai mahkamah tidak diberikan serta merta selepas pemfailan di pejabat pendaftaran mahkamah atau melalui sistem *e-filing*.

Case(s) referred to:

Alami Vegetable Oil Products Sdn Bhd v. Hafeez Iqbal Oil & Ghee Industries (Pvt) Ltd [2016] 7 CLJ 19 CA ***(refd)***

Comandate Marine Corp v. Pan Australia Shipping Pty Ltd [2006] FCAFC 192 ***(refd)***

Jumatsah Daud v. Voon Kin Kuet & Anor [1980] 1 LNS 176 ***(refd)***

Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 PC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Continental Automotive Instruments (M) Sdn Bhd [2014] 1 LNS 1301 HC ***(refd)***
Majlis Perbandaran Kangar v. Sonati Development Corporation Sdn Bhd [2006] 4 CLJ 953 CA ***(refd)***
MBf Cars Services Sdn Bhd v. Chew An Too [2009] 1 CLJ 140 CA ***(refd)***
Ng Cheah Cheong v. Ong Sing Hock [2002] 7 CLJ 504 HC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 1A, O. 2, O. 55 r. 3(4)

Other source(s) referred to:
Janab's Key To Civil Procedure, 5th edn, p 3

For the appellant - Veronica Steven & KV Ong; M/s KV Ong, Chua & Partners
For the respondent - Saiffuddin Othman; M/s Wan Abd Mutallib & Co

[Editor's note: Appeal from High Court, Kuala Terengganu; Civil Appeal No: TA-11B-1-01-2016 (overruled).]

Reported by S Barathi

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] There are three appeals before us relating to a procedural point on notice of appeal. We heard all the three appeals together and allowed the appeals.

[2] The appeals essentially involved application of common sense principles in decision-making process and construction of Rules of Court (RC 2012) to attain substantive justice.

[3] It is now well-established that common sense jurisprudence has been a tool for the so-called 'reasonable man' in his decision-making process. This jurisprudence has been captured in a number of English decisions as well as the decision of our apex court in a number of cases in relation to decision-making process by the courts. In the case of *Alami Vegetable Oil Products Sdn Bhd v. Hafeez Iqbal Oil & Ghee Industries (Pvt) Ltd* [2016] 7 CLJ 19, the Court of Appeal had this to say:

> ... Lord Denning had often reminded us that judicial decision must not be confined to law but also common sense which we these days called as purposive approach and is partly codified. (See s. 17A of the Interpretation Acts). At times, without the application of common sense, a just result cannot be achieved. Common sense approach has been adopted in a number of Malaysian judgments.

(See (i) *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1; [1989] 1 MLJ 457; (ii) *Comandate Marine Corp v. Pan Australia Shipping Pty Ltd* [2006] FCAFC 192).

[4] The RC 2012, to ensure the merits of the case or appeal is heard to attain substantive justice, have introduced a number of provisions to fortify the principles. Cases now have to be heard on merits and cannot be dismissed for non-compliance of rules unless there are exceptional reasons to do so. For example, O. 1A of RC 2012 asserts:

> ORDER 1A
>
> Regard shall be to justice (O. 1A)
>
> In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules.

And O. 2 asserts:

> ORDER 2
>
> Non-compliance with Rules (O. 2 r. 1)
>
> 1. (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been non-compliance with the requirement of these Rules, the non-compliance shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.
>
> (2) These Rules are a procedural code and subject to the overriding objective of enabling the Court to deal with cases justly. The parties are required to assist the Court to achieve this overriding objective.
>
> (3) The Court or Judge may, on the ground that there has been such non-compliance as referred to in paragraph (1), and on such terms as to costs or otherwise as it or he thinks just, bearing in mind the overriding objective of these Rules, exercise its or his discretion under these Rules to allow such amendments, if any, to be made and to make such order, if any, dealing with the proceedings generally as it or he thinks fit in order to cure the irregularity.

[5] In the 5th edition of *Janab's Key To Civil Procedure* at p. 3 on non-compliance, the author had this to say:

> The previous Order 1A and Order 2 of the RHC 1980 have been further fortified to ensure that cases are heard on merits. The court before striking out, must consider the overriding interest of justice and not only the technical non-compliance of the rules. This overriding interest of justice concept is sufficiently wide enough to encompass the position and jurisprudence relating to non-compliance in the U.K.

[6] In the light of O. 1A and O. 2 of RC 2012, it is not an option anymore for the courts to strike out a matter for non-compliance of the rules without giving an opportunity to the litigant to regularise the proceedings or to

condone the irregularity by the fiat of the court. It is only in extremely rare cases where the non-compliance cannot be condoned at all, the court will be obliged to strike out the matter. Those are the cases where the respondent can demonstrate prejudice as well as can establish that the breach cannot be compensated by costs.

Brief Facts

[7] In the instant case, there were three actions in the Magistrate's Court. The decisions for all three actions were given on 14 December 2015. The appellants/defendants had filed and served a duplicate copy of the notice of appeal on 23 December 2015 within the stipulated time of 14 days from the date of decision. The notice of appeal is in Form 111 of the RC 2012. There is no requirement under Form 111 for any endorsement or seal of the court to be placed on the notice of appeal unlike a writ or originating process, etc. The said Form 111 reads as follows:

No. 111

NOTICE OF APPEAL (AFTER TRIAL) (O. 55 r. 3)

(Heading)

Take Notice that ... (1) being dissatisfied with the decision of the Sessions/Magistrates' Court after trial at ... given on the ... day of ... , 20 ..., appeals to the High Court against either/or the whole of the said decision such part of the said decision as decides that

(set out details)

Dated the ... day of ... 20 ...

...

Appellant/Solicitor for the Appellant

To

The Registrar, Sessions Court at ...

The Magistrate at ...

and to

...

... (2)

NOTES:

(1) Insert name of appellant.

(2) Insert name and address of respondent or respondents.

[8] The RC 2012 only requires a duplicate copy of the notice of appeal to be served within the time frame. The relevant order is O. 55 r. 3(4) reads as follows:

> Notice of appeal against a decision made after trial (O. 55 r. 3)
>
> 3. (1) A notice of appeal against a decision made after trial shall substantially be in Form 111 and shall be filed in the Court from which the decision is appealed from.
>
> (2) Any appellant may appeal from the whole or part of a judgment or order and the notice of appeal shall state whether the whole or part only, and what part, of the judgment or order is complained of.
>
> (3) At the time of the filing of the appeal under this rule, the appellant shall, unless the Court for sufficient cause otherwise orders, lodge in the Court appealed from a sum of one thousand ringgit by way of security for the costs of the appeal within the time limited for filing of the appeal.
>
> (4) A duplicate copy of the notice of appeal must be served by the appellant within the time limited for the filing of an appeal on all respondents.

[9] The learned High Court Judge in interpreting RC 2012 took into consideration three reported decisions to rule that it is not sufficient to serve a duplicate copy and held the copy to be served must be endorsed by the court. The cases relied by learned judge were as follows: (i) *Majlis Perbandaran Kangar v. Sonati Development Corporation Sdn Bhd* [2006] 4 CLJ 953; [2007] 1 MLJ 133; (ii) *MBf Cards Services Sdn Bhd v. Chew Ah Too* [2009] 1 CLJ 140; [2009] 1 MLJ 684; (iii) *Ketua Pengarah Hasil Dalam Negeri v. Continental Automotive Instruments (M) Sdn Bhd* [2014] 1 LNS 1301; [2015] 9 MLJ 857.

[10] Learned counsel for the appellant on this issue *inter alia* submits as follows:

> (i) it was of course not disputed that the Notice of Appeal was filed in the Court Registry on 23.12.2015, which is within the stipulated 14 days' time frame;
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> (ii) the duplicate copy of the Notice of Appeal was served on the Respondent/Defendant on 23.12.2015, again it is within the stipulated time frame;
>
> (iii) that the Respondent/Plaintiff was put on notice of the appeal within 14, therefore, they were not prejudiced in any manner; and
>
> (iv) most importantly, the Learned Judge, failed to take into account the changes in the provision as stated in Order 55 Rule 3 (4) ROC 2012, whereby the new requirement is that only a "duplicate" copy of the Notice of Appeal need to be served on the Respondent.

[11] We have read the appeal record for all the three appeals and the able submissions of the parties. We are of the considered view that the appeals should be allowed *in limine*. Our reasons *inter alia* are as follows:

(i) in the instant case, notice of appeal as well as the duplicate copy of the appeal have been served on the respondent within time frame and in compliance with O. 55 r. 3(4) of the RC 2012;

(ii) there is no requirement in law or rules to require an endorsed notice of appeal to be served within the time frame of the appeal. Even if there is such a rule, it will cause travesty of justice as it is common knowledge that court documents and endorsement or seal of the court are not placed immediately upon filing at the court registry or even through the e-filing system. (See *Jumatsah Daud v. Voon Kin Kuet & Anor* [1980] 1 LNS 176; [1981] 1 MLJ 254]. The decision of His Lordship Justice VT Singam in the case of *Ng Cheah Cheong v. Ong Sing Hock* [2002] 7 CLJ 504; [2002] 6 MLJ 481 is very instructive not only for decisions made in respect of Rules of the High Court 1980 but also for RC 2012. Very importantly, the decision also reflects common sense jurisprudence in decision-making process. The facts of that case as summarised by the learned editors of MLJ read as follows:

> This is an appeal against the decision of the Sessions Court, Taiping that dismissed the appellant's claim for damages for injuries arising out of a road accident that occurred on 2 November 1993 involving his motorcycle and a motorcycle that was ridden by the respondent. The appeal was against liability and quantum. The appellant in this case was the plaintiff, aged 23 years, a restaurant worker. He had filed an action at the Sessions Court, Taiping for general and special damages against the respondent. At the outset of the appeal that came up for hearing, the respondent raised a point of law as a preliminary objection that the appeal was not properly brought before this court. It was contended that the notice of appeal which was served on the respondent's solicitor was defective as the copy which was served was not endorsed by the court, in this case by the Sessions Court, Taiping, before it was served as required under O. 49 r. (2)(6) of the Subordinate Courts Rules 1980 ('the SCR').

The court in allowing the appeal *inter alia* held that:

> (1) The whole purpose of serving a copy of the notice of appeal on the opponent or the respondent or on all parties directly affected by the appeal within the time frame limited to file an appeal under the rules is to give early notice to the parties that the appellant is dissatisfied with the decision of the court and that he wishes to appeal to the High Court. By this early notice, there will be no room for surprises, delays and prejudice caused to any party directly affected by the appeal. The legislature and the Rules Committee have, in their own wisdom, not required an endorsed copy by the court of the notice of appeal to be served on the respondent's

A solicitors and that it only required service of the notice of appeal, and that it be served within the time limited to file the appeal, being within 14 days from the date on which the decision was pronounced by the lower court (see p 488D-F).

(2) In the face of this express provision in O. 49 r. 2(6) of the SCR which
B is crystal clear, so plain and unambiguous, there was no requirement for an endorsed copy by the court of the notice of appeal to be served on the respondent's solicitors. If this requirement is insisted it would surely be a usurpation of the legislative function and an extension to the Parliamentary language, and this court would then be encroaching into the domain of the legislature and importing words into the rules of the
C court which have in fact statutory force. This court is reminded that the function of this court is 'interpretation, not legislation'. Consequently, it is not the function of this court to include words to the rules of the court (see pp 488F-H, 489F); *Himat Iktisas (M) Sdn Bhd v. Better Sleep Marketing (East Coast) Sdn Bhd* [2002] 1 MLJ 577.

D **[12]** For reasons stated above, all the appeals are allowed with no order as to costs and deposits are to be refunded.

We hereby ordered so.

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